IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-546

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD,

Appellant,

V.

CHEMICAL REALTY CORPORATION,

Appellee.

On Appeal from the Supreme Court of the state of North Carolina Dismissing Appellant's Appeal and Denying its Petition for Certiorari

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INDEX

TABLE OF CITATIONS.

Statutes:

JURISDICTIONAL STATEMENT

The Supreme Court of North Carolina, by Judgment entered and certified on July 5, 1979, dismissed appellant's appeal from the judgment of the Court of Appeals of the State of North Carolina, filed on April 17, 1979, and certified on May 7, 1979, and denied the petition for discretionary review filed alternatively by appellant.[1] The judgment of the North Carolina Court of Appeals affirmed the denial by the Superior Court of Buncombe County, North Carolina, of appellant's motion to dismiss for lack of jurisdiction over the person of appellant. Appellant submits this jurisdictional statement to show that this Court has jurisdiction and that substantial questions are presented.

OPINIONS BELOW

The North Carolina Supreme Court's judgment dismissing appellant's appeal and denying appellant's petition for discretionary review is reported without opinion at 297 N.C. 612, ___ S.E.2d ____ (1979). A copy of said judgment

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1 The dismissal by the North Carolina Supreme Court of appellant's appeal and denial of its petition for discretionary review thus resulted in the full effectiveness and finality of the North Carolina Court of Appeals' decision, no further review thereof being possible in the North Carolina courts.

of the North Carolina Supreme Court is attached hereto as Appendix A.

The opinion of the North Carolina Court of Appeals on which this appeal is based is reported at 40 N.C. App. 675, 253 S.E.2d 621 (1979). A copy of said opinion of the North Carolina Court of Appeals is attached hereto as Appendix B.

JURISDICTION

This proceeding is in the nature of an appeal from a final judgment of the North Carolina Supreme Court, the highest Court in North Carolina in which a decision could have been and was had in the instant case. In this appeal the validity of the application of a North Carolina statute to the jurisdictional facts of this case is challenged on the ground that to apply same in this case would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States. The decision of the North Carolina Supreme Court dismissing appellant's appeal from the judgment of the North Carolina Court of Appeals is in favor of the validity of the application of said statute to the facts of this case.

This proceeding is brought pursuant to 28 U.S.C. §1257(2).

The judgment of the North Carolina Supreme Court involved herein was entered and certified on July 5, 1979. Said judgment, by dismissing appellant's appeal and denying its petition for

discretionary review, affirmed the opinion of the North Carolina Court of Appeals, which was filed on April 17, 1979, and certified on May 7, 1979.

There has been no order issued or entered for a rehearing.

The notice of appeal herein was filed on September 19, 1979, with the North Carolina Court of Appeals, the court possessed of the record, and the North Carolina Supreme Court. A copy of said notice of appeal is attached hereto as Appendix C.

Appellant respectfully submits that jurisdiction of this appeal is conferred on this court by 28 U.S.C. §1257(2) which provides as follows:

> §1257. State courts; appeal; certiorari. - Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Jurisdiction under this section is based on the ground that the decision below upheld the validity of a state statute against a claim that it

is repugnant to the Fourteenth Amendment of the Constitution of the United States and that a final judgment of the highest court of the state in which a decision could be had has been rendered. The following cases support appellant's contentions in this regard:

Rosenblatt v. Am. Cyanamid Co., 86 S.Ct. 1 (1965), provides compelling support for this court's jurisdiction of this appeal. There the appellant contested personal jurisdiction on the ground of violation of due process by a pre-trial motion to dismiss. An order of the New York Supreme Court denied this motion. Upon appeal to the Appellate Division, the order of the trial court was affirmed. In an appeal thereafter to the New York Court of Appeals, that court affirmed the decision of the lower court without opinion. The Court of Appeals later amended its order to clarify that it had passed upon and rejected appellant's constitutional claim. The United States Supreme Court, in sustaining appellant's appeal pursuant to 28 U.S.C. §1257, held that the judgment below was final for purposes of review by this court, relying on Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963), and Local No. 438 Constr. and Gen. Laborers' Union v. Curry, 371 U.S. 542 (1963). The rationale which this court stated in its Rosenblatt opinion as support for its determination of finality equally supports this court's jurisdiction over this appeal:

> ...(1) [A] final assertion of jurisdiction, with no further

> review of that issue possible in the state courts; (2) a threat of serious erosion of national policy (here, the due process right against subjection to excessive state assertions of in personam jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits and not enmeshed in the factual controversies of the case.... These cases rest upon the premise that a litigant should not be forced to take the risk of a default judgment in order to obtain the benefits which national policy --- in Curry, federal pre-emption of unfair labor practice cases; in Langdeau, a special venue statute for national banks; here, if appellant is correct, due process --- is designed to afford him. Rosenblatt v. Am. Cyanimid Co., supra at p. 3.

Just as the judgment in Rosenblatt was deemed a proper subject of appeal for review by the United States Supreme Court, the judgment of the North Carolina Supreme Court herein is a proper subject of appeal to and for review by this court.

In the case of American Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976), a pre-trial venue determination was appealed to the Texas Court of Civil Appeals. Appellant therein charged that a Texas venue statute contained excep-

tions that violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Texas Court of Civil Appeals affirmed the pre-trial venue determination and held that the venue statute in question was not void and unconstitutional. The appellant then applied to the Supreme Court of Texas for a writ of error. That application was dismissed by the Supreme Court of Texas "for want of jurisdiction." The United States Supreme Court noted probable jurisdiction, holding thereby that the judgment for which review was sought was final for the purposes of 28 U.S.C. §1257(2).

The procedural history of the instant appeal in the North Carolina courts has been practically identical to that in American Motorists Ins. Co. v. Starnes, ibid. Appellant herein appealed to the North Carolina Court of Appeals from the pre-trial order of the Buncombe County Superior Court, which denied appellant's Rule 12(b), N.C. R. Civ. Proc., motion to dismiss for lack of in personam jurisdiction of the North Carolina courts over appellant. The North Carolina Court of Appeals upheld under N.C.G.S., §55-145, the determination of the trial court allowing assertion of personal jurisdiction over appellant, notwithstanding appellant's argument to that Court that the assertion of jurisdiction over it violated the due process clause of the Fourteenth Amendment because appellant had insufficient contacts with North Carolina. Appellant then appealed to the Supreme Court of North Carolina and alternatively

petitioned that court for discretionary review of the decision of the Court of Appeals. The North Carolina Supreme Court dismissed appellant's appeal and denied its petition for discretionary review. This court determined in American Motorists Ins. Co. v. Starnes, ibid., that, based on procedural history parallel to that herein, the judgment for which review was sought was final for purposes of 28 U.S.C. §1257.

In a footnote to the finding of probable jurisdiction in American Motorists Ins. Co. v. Starnes, ibid., the Court stated that the judgment before the Court was deemed final for the reasons stated in Mercantile Nat'l Bank v. Langdeau, supra at p. 558, as follows: (1) that the venue question was separate, independent and anterior to the merits of that case and not enmeshed in the factual and legal issues of plaintiff's case therein; and (2) that the policy underlying the §1257(2) requirement of finality would be served by determining prior to trial on the merits the proper court in which suit could be brought rather than deferring such determination until the complex litigation had been completed in a possibly incorrect venue, causing such litigation thereby to have been in vain.

In the instant appeal, the lawsuit alleges a breach of a purported agreement between appellant and appellee under which appellant was either to make a permanent loan to a borrower (not a party to this case) or to "take-out" appellee's construction loan to said borrower. The question of personal jurisdiction over the person of

the appellant is thus separate, independent and anterior to the merits of appellee's lawsuit. Even more compelling is the fact that a complete determination as to jurisdiction of the North Carolina courts over the person of appellant herein would serve the policy underlying the §1257(2) requirement of finality to a greater degree than the determination of venue in the above cited cases. As in Mercantile Nat'l Bank v. Langdeau, ibid., an adjudication by the United States Supreme Court in this appeal would determine whether the North Carolina courts had jurisdiction, and, if not, in which jurisdiction the case should proceed on the merits. If this court should determine that the North Carolina courts lacked jurisdiction over appellant, appellee's attempt to bring its lawsuit in North Carolina would be terminated, whereas in Mercantile Nat'l Bank v. Langdeau, ibid., the decision merely determined in which district of the state court system the lawsuit properly lay. Termination of the litigation was not a possibility as it is in this case.

The cases previously decided by this court sustain the jurisdiction of and this appeal to the United States Supreme Court as to the judgment at issue herein.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article 1, Section 8, Clause 3, United States Constitution:

> The Congress shall have Power . . . .

To regulate Commerce . . ., among the several States, . . .;

Article 6, Clause 2, United States Constitution:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . , shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statutes, Chapter 55, Business Corporation Act; Article 10, Foreign Corporations:

> §55-131. Right to transact business. . . (b) Without excluding other activities which may not

> constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State, for the purpose of this Chapter, by reason of carrying on in this State any one or more of the following activities:
>
> . . . .
>
> (6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State . . . .
>
> (7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same . . . .
>
> . . . .
>
> (9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature. (Emphasis added.)

North Carolina General Statutes, Chapter 55, Business Corporation Act; Article 10, Foreign Corporations:

> §55-145. (a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is

> engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> (1) Out of any contract made made in this State or to be performed in this State; . . . .

Although other "long-arm" statutory provisions are contained in §§55-144 and 1-75.4 of the North Carolina General Statutes, these statutes would not appear applicable to the facts in this appeal and are not set out herein, because the North Carolina Court of Appeals did not base its decision upon or refer to said statutes in its opinion. These statutes are attached as Appendices D-1 and D-2.

QUESTIONS PRESENTED

I

Where neither appellant nor appellee were residents of nor licensed to transact business in North Carolina, does appellant have the requisite "minimum contacts" with North Carolina to satisfy the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution for assertion of personal jurisdiction over it by the North Carolina courts?

II

Where North Carolina by statute (N.C.G.S., §55-131(6)) has specifically provided that the making of a loan with security by a foreign corporate lender shall not be considered to be transacting

business in said state under Chapter 55, does the assertion by the North Carolina courts of personal jurisdiction under N.C.G.S., §55-145(a)(1), over appellant, a foreign corporate lender, violate the "fairness" requirement of the due process clause of the Fourteenth Amendment to the United States Constitution enunciated in Shaffer v. Heitner?

III

Does N.C.G.S., §55-145(a)(1), provide a statutory basis for the assertion by the North Carolina courts of personal jurisdiction over appellant, where its only contact with North Carolina has been the issuance of a loan commitment and the making of a loan, both of which were solicited from it by an independent contractor representing the respective borrowers as a broker and made by it from Florida?

STATEMENT OF THE CASE

In this case, a New York corporation, Chemical Realty Corporation (hereinafter referred to as appellee or Chemical), has instituted suit in the Superior Court of Buncombe County, North Carolina, against Home Federal Savings and Loan Association of Hollywood (hereinafter referred to as appellant or Home Federal), a federal savings and loan association organized under the Acts of Congress with its principal office in Hollywood, Florida. Chemical's complaint sets forth a claim for relief based on Home Federal's alleged failure either to purchase the construction loan from Chemical which it made to the owner of the Landmark Hotel in Asheville, North

Carolina, or to extend the term of its commitment to provide permanent financing for said Landmark Hotel. Both failures are alleged to have occurred on October 14, 1974, in Hollywood, Florida. Chemical's complaint also alleges that it is suing as the third-party beneficiary of an agreement between its borrower (Landmark Hotel, Inc., successor to Asheville Development Associates) and Home Federal.

Thus, a New York lender (Chemical) is suing a Florida lender (Home Federal) in Buncombe County, North Carolina, for alleged breaches of duty by the Florida lender which occurred in Florida arising out of an agreement intended to have been consummated in Florida to which agreement Chemical was not a party but an alleged third-party beneficiary. Neither Chemical nor Home Federal is a North Carolina resident or licensed to do business in this State. The alleged agreement in question was not to be performed in North Carolina, and the alleged breaches thereof did not occur in North Carolina.

The permanent loan commitment at issue herein was solicited by Atlantic Mortgage and Investment Company of Winston-Salem, North Carolina (hereinafter referred to as Atlantic Mortgage) in the early spring of 1972. The initial contact regarding this commitment was made by Atlantic Mortgage at Home Federal's office in Hollywood, Florida. The terms and conditions of this commitment were negotiated in Hollywood, Florida and by telephone between Thomas M. Wohl of Home Federal

in Florida and J. P. Lauffer of Atlantic Mortgage in North Carolina, according to the deposition testimony of the two principals of said negotiations, Thomas M. Wohl and J. P. Lauffer. Some of the terms of the proposed loan commitment were discussed and negotiated at a meeting in Asheville, North Carolina, between Wohl, Lauffer and Earl Crawford of the North Carolina investment partnership which was undertaking the hotel project.

After the terms of the commitment had been negotiated and agreed upon, Thomas Wohl of Home Federal prepared the permanent loan commitment letter, dated April 14, 1972, and delivered this letter in Florida to Atlantic Mortgage for forwarding to Crawford for approval and execution by him. See Appendix E-1. The last two sentences of the letter provided that the permanent loan commitment would be deemed accepted when received by Home Federal in Hollywood, Florida, with the commitment fee. Mr. Crawford of Asheville Development Associates, the partnership undertaking the hotel project, signed said permanent loan commitment letter but returned it to Michael Burroughs of Atlantic Mortgage with a cover letter dated May 15, 1972, in which he requested certain changes in the permanent loan commitment. See Appendix E-2. Home Federal contends that this constituted a conditional acceptance by the borrower of Home Federal's offer to make a permanent loan commitment and was, therefore, a counter-offer. In response to Earl Crawford's counter-offer as contained in said May 15, 1972 letter, Thomas M. Wohl of Home Federal accepted

the conditions of the counter-offer by his May 24, 1972 letter to J. P. Lauffer of Atlantic Mortgage. See Appendix E-3. The May 24, 1972, letter from Home Federal signified a final meeting of the minds on the terms of the permanent loan commitment and was executed at the offices of Home Federal in Hollywood, Florida, and delivered or mailed therefrom to representatives of Atlantic Mortgage or Earl Crawford.

Thereafter, representatives of Home Federal wrote seven letters from its office in Hollywood, Florida, to persons located in North Carolina relative to its permanent loan commitment. Representatives of Home Federal visited North Carolina on four separate occasions in connection with the permanent loan commitment.

The permanent loan commitment was offered and accepted by the borrower six or seven months before Chemical made its construction loan commitment. Chemical was not involved in any of the negotiations between the borrower and Home Federal.

Home Federal's only other contact with North Carolina was in connection with a permanent loan commitment which it made to Carl J. Beacham and wife, Helen B. Beacham, on the Beacham apartments located in Jacksonville, North Carolina, more than four years prior to the commencement of this lawsuit. Pursuant to a solicitation made by Atlantic Mortgage in Hollywood, Florida, Home Federal issued from its home offices in Hollywood, Florida, a letter dated

November 29, 1972, offering to commit to provide permanent financing to Mr. and Mrs. Beacham for the Beacham apartments to be constructed. Subsequently, representatives of Home Federal visited North Carolina on one occasion in connection with said commitment. Home Federal entered into a servicing agreement with Atlantic Mortgage as an independent contractor to service said loan as required by the regulations of the Federal Home Loan Bank. The permanent loan to Mr. and Mrs. Beacham was closed by a Hollywood, Florida law firm retained by Home Federal and a North Carolina law firm associated by said Hollywood, Florida law firm.

Home Federal has had no other contacts with North Carolina. The main office of Home Federal is located at 1720 Harrison Street, Hollywood, Florida, and all corporate books and records concerning the business operations and activities of Home Federal are kept and maintained at that office. Home Federal has no certificate of authority to transact business in North Carolina, nor has it applied for any such authority; it does not have or maintain any registered office in the State of North Carolina; and it has not appointed any agent or other person upon whom process, notice or demand may be served upon it in North Carolina as required or permitted by law. Home Federal does not transact business in North Carolina within the meaning of any of the statutory sections of Chapter 55 of the North Carolina General Statutes. Furthermore, Home Federal has not engaged in any of the activities or transactions which would give rise

to jurisdiction over it in North Carolina under the provisions of N.C.G.S., §1-75.4.

Chemical Realty is a New York corporation engaged during the times referred to herein primarily in the business of making construction loans, with its principal offices located in New York, New York. It is not and never has been authorized to transact business in North Carolina and does not have an agent or place of business in North Carolina.

In addition to Home Federal's contention that the contract at issue was made in Florida, Home Federal would also highlight the fact that the alleged breach of the permanent loan commitment is alleged to have occurred in Hollywood, Florida, in the offices of Home Federal, which was the place where performance under the terms of the commitment was contemplated.

With this factual background as to contacts with and/or activities within or the lack thereof, North Carolina, Home Federal following its receipt of notice of Chemical's complaint filed a motion to dismiss on the ground, inter alia, that the North Carolina courts lacked personal jurisdiction over it. Its motion was filed on January 19, 1977, and a hearing on this and other motions before the court in this case was held before a resident Superior Court judge on August 26, 1977 in Buncombe County, North Carolina. By order of October 1, 1977, the trial court denied said motion to dismiss for

lack of jurisdiction over Home Federal. On that same day, a notation was entered on the order indicating Home Federal's exception and objection to the signing and entry of the order and also indicating Home Federal's oral notice of appeal as given by its attorney of record. Home Federal timely filed its appeal to the North Carolina Court of Appeals in which appeal Home Federal assigned as error the trial court's denial of its motion to dismiss for lack of jurisdiction over it.

In an opinion filed on April 17, 1979, the North Carolina Court of Appeals ruled that ". . . .G.S. 55-145(a)(1) applies to give the North Carolina courts personal jurisdiction over Home Federal." Further, in addressing Home Federal's arguments that such assertion of jurisdiction would violate due process requirements and protections, the Court stated:

> Home Federal next contends that even if the statutory standards for jurisdiction are met, the constitutional requirements of due process are not. This contention is untenable . . . . Due process is satisfied.

Thus the long-arm statutory provision contested by Home Federal as being unconstitutional was deemed valid by the North Carolina Court of Appeals.

From the opinion of the North Carolina Court of Appeals, Home Federal

appealed to the North Carolina Supreme Court, the highest court of the state. Additionally, Home Federal alternatively petitioned the North Carolina Supreme Court for discretionary review of the judgment of the Court of Appeals. In its notice of appeal to the North Carolina Supreme Court, Home Federal contended that the judgment of said Court of Appeals directly involved substantial questions arising under the Fourteenth Amendment to the United States Constitution.

In conference, and without briefs on the merits or oral argument, the North Carolina Supreme Court adjudged that Home Federal's appeal should be dismissed and its petition for discretionary review denied. Said Order of the North Carolina Supreme Court was entered and certified on July 5, 1979, and forwarded to counsel of record on the same date. The judgment of the North Carolina Court of Appeals was thereby rendered effective by the determination by the North Carolina Supreme Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented herein are substantial for the following reasons.

1. This case involves the attempted assertion of jurisdiction by North Carolina over a federally chartered Florida savings and loan association and the applicability of North Carolina's long-arm statutes to an interstate loan transaction.

2. This case represents the first reported instance of an attempt by the North Carolina courts to assert jurisdiction under its long-arm statutes over litigation in which neither party to the lawsuit is a resident or otherwise present in the forum and the litigation involves a transaction to be performed outside of the state.

3. There is an apparent conflict in the decisions of the North Carolina appellate courts and the federal courts in their determination of what constitutes sufficient "minimum contacts" to permit the application of N.C.G.S., §55-145(a)(1), to contractual transactions involving foreign corporations.

4. Finally, this court has repeatedly expressed its concern for insuring that non-residents of a state shall be accorded full "due process" protection in connection with any attempt by a state to subject them to the jurisdiction of its courts.

I

APPELLANT'S CONTACTS WITH NORTH CAROLINA ARE TOO FEW AND INSUBSTANTIAL TO ALLOW ASSERTION OF JURISDICTION BY THE NORTH CAROLINA COURTS OVER APPELLANT WITHOUT VIOLATING ITS CONSTITUTIONALLY GUARANTEED RIGHT OF DUE PROCESS.

Appellant's contacts with North Carolina with respect to the gravamen of this case involve a permanent loan commitment which it issued from

Florida for a hotel to be built in North Carolina, several letters and phone calls to and from appellant in Florida and four visits by representatives of appellant to North Carolina in connection with its permanent loan commitment. In a separate, isolated transaction, appellant made a loan on an apartment project in North Carolina. In both transactions, a mortgage broker representing the borrowers solicited the loan, handled the negotiations for making the commitment and closing the loans and serviced same as an independent contractor. Other than these two instances, appellant has had no contacts with North Carolina.

Any assertion of jurisdiction by North Carolina over a foreign defendant such as appellant must ultimately be examined in light of the due process requirements that such assertion not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Examining appellant's contacts with North Carolina in light of the standards enunciated in International Shoe Co. v. Washington, ibid, and subsequent case law, it becomes immediately apparent that the North Carolina Court of Appeals, in sustaining the trial court's order upholding its jurisdiction over appellant, has violated the due process protection guaranteed to foreign defendants.

Not only are the "minimum contacts/due process" issues raised by

this appeal substantial, but also they represent the logical extension of the line of questioning being posed in light of this court's decision in Shaffer v. Heitner, 433 U.S. 186 (1977), relative to overreaching by the long-arm statutes which various states have enacted. Although Shaffer involved the application of in personam jurisdictional rules to a quasi in rem factual situation, this court appears to have added another requirement for in personam jurisdiction and pointed out that the situs of the physical object of a controversy such as the hotel to have secured the permanent loan here, does not determine the due process requirements for jurisdiction. The ramifications of this case for future in personam cases has been the subject of a number of commentaries.[2]

Prior to Shaffer v. Heitner, supra, in personam jurisdictional challenges based on due process grounds had been analyzed in accordance with the standards enunciated in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and Hanson v. Denckla, 357 U.S. 235 (1958). International Shoe had established the modern day jurisdictional standard that in order to comport with due process a forum could not assert

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2 In addition to the articles cited herein, see also Charawell, Shaffer v. Heitner: A Single Standard for Acquiring Jurisdiction and its Implications in Idaho, 15 Idaho L.Rev. 141 (1978), for example.

jurisdiction over a foreign defendant unless that defendant had sufficient contacts with the forum such that jurisdiction in said forum would not offend traditional notions of fair play and substantial justice. The ensuing applications of International Shoe suggested that almost unbridled exercise of jurisdiction was to be granted to the several states, such trend reaching perhaps its outer limits in McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).[3] In Hanson this court appeared to indicate that limitations on jurisdiction had not been abandoned. Furthermore, the necessity for minimum contacts was reiterated and the requirement that the defendant must do some act by which it purposefully avails itself of the privilege of conducting activities within the forum state was added. Hanson v. Denckla, supra at p. 253.

Shaffer v. Heitner, supra, next added a further factor to be considered in analyzing minimum contacts. This additional requirement for all jurisdictional cases, including in personam jurisdiction, is fairness. Id. at p. 711. The commentary in

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3 A number of commentators have suggested that McGee v. Int'l Life Ins. Co., supra, is an exception, relating solely to the regulated life insurance industry, to the state decisis which has evolved concerning the due process requirements for in personam jurisdiction.

19 Santa Clara L. Rev. 217 (1979) provides a detailed and helpful analysis of Shaffer and its ramifications for in personam jurisdiction. This commentary notes that Shaffer, by focusing on the quality of the relationship between defendant and the forum and on the fairness of asserting jurisdiction under the circumstances of the particular case, provides a new standard which gives increasing importance to the peculiar facts of each case. The result would seem to be that more cases will be arguable either way and that fewer cases will lie snuggly in the jurisdictional tests utilized before Shaffer. This result is of course due to the "fairness" requirement imposed by Shaffer.

In Kulko v. Superior Court, 436 U.S. 84 (1978), the principles enunciated in Shaffer were applied to an in personam jurisdiction case. Utilizing what has been tagged as the "unified jurisdictional test"[4] that resulted from the addition of Shaffer to the existing guidelines, this court in Kulko cited the lack of a strong nexus between the forum and the defendant in denying jurisdiction. Elaborating further the Court said that even a strong "forum-plaintiff" and "forum-litigation" nexus will not override the need for a strong "forum-defendant" nexus.[5] Quoting Hanson v.

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4 Comment, 1978 Wash. U.L.Q., No. 4, P. 797 (1978).

5 436 U.S. 84 at 98.

Denckla, supra, it was noted in Kulko that the threshold for determining whether the required nexus exists is the Hanson "purposefully availed" criteria. Kulko also reiterated the necessity of a case-by-case analysis of cases raising these jurisdictional issues.

The Shaffer and Kulko cases further emphasize the important questions raised by this case and the fact that a determination by this court of the issues raised by this appeal is needed to resolve the jurisdictional questions in accordance with the standards now applicable. The contacts of appellant with North Carolina do not create the "defendant-forum" nexus necessary for sustaining jurisdiction. Stated in Shaffer terms, it is simply not fair to subject appellant to jurisdiction in North Carolina in light of the minimal and incidental contacts, solicited by one other than appellant, which are present here. Additionally, appellant would cite that this case presents a prime factual situation for the Court to amplify, clarify and apply the unified jurisdictional test which has been suggested by the following cases applicable to the facts here.

The case of Piracci v. New York City Employees' Retirement Sys., 321 F.Supp 1067 (D. Md. 1971), involved facts almost identical to those in the instant case. There a permanent loan commitment was made by a foreign corporation whose contacts with the forum state of Maryland consisted of sending inspectors to Maryland on

several occasions to report on the progress of the project, a previous loan commitment on another project in Maryland, and a tri-partitite loan agreement with the borrower and construction under which the construction lender made a construction loan in reliance on defendant's permanent loan commitment. The defendant had no office or agents in Maryland. The court held that due process required a finding of no jurisdiction.

In reaching this conclusion the Piracci court considered each of the contacts of the defendant and found them to be too minimal to allow jurisdiction.

> Viewed in isolation, the sending of the inspectors into Maryland would not amount to minimum contacts sufficient to satisfy the constitutional tests. Id. at p. 1072.
>
> The other commitment, on a Baltimore post office, is a factor to be considered, but a very minor factor.
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> Again, the various actions taken by plaintiffs in Maryland in reliance upon the commitment amount to no more than "unilateral activity of those who claim some relationship with a non-resident defendant.
>
> . . . the cause of action did not arise from or out of any business transacted in Maryland.

> There was no solicitation in Maryland; the agreement upon which plaintiffs sued was made in New York and was repudiated there; and the cause of action does not rest on what the inspectors did or did not do on their visits in Maryland. Id. at p. 1073.

These passages from Piracci speak pointedly to the contacts in the instant case and show those contacts not to be of the substantial nature required by due process.

There were other factors in Piracci which created a stronger "nexus" with the forum there and are absent in this case. In Piracci the plaintiffs were residents of Maryland. Here neither the plaintiff-appellee nor appellant is a North Carolina corporation or has a place of business in North Carolina or transacts business there. Secondly, there was a tri-partite loan agreement in Piracci between the borrower, the construction lender (a Maryland lender) and defendant. Here the permanent loan commitment sued upon was from appellant to the broker for the prospective borrower, which are not parties to this action. This case thus presents a more compelling set of facts for finding sufficient contacts than even the Piracci case.

In Golden Belt Mfg. Co. v. Janler Plastic Mold Corp., 281 F.Supp. 368 (M.D.N.C. 1967), the District Court for the Middle District of North Carolina

held that the contacts of the defendant with North Carolina were insufficient to satisfy due process, where plaintiff sought to sue defendant for damages for breach of contract. The nature and substance of the Illinois defendant's contacts with North Carolina are similar to those of appellant here: principal place of business out-of-state, initial contact with North Carolina solicited by visit to defendant's principal office located out of North Carolina, and submission of a proposal by defendant upon which a contract could be made. The court found that the Illinois corporation lacked the contacts with North Carolina necessary for jurisdiction to comport with due process, even though the plaintiff there was a resident of North Carolina.

Another case which presents contacts more substantial than those here is United Advertising Agency, Inc. v. Robb, 391 F.Supp. 626 (M.D.N.C. 1975), in which sufficient contacts to satisfy due process were not found. Those connections consisted of performance of advertising services in North Carolina pursuant to a contract with the North Carolina plaintiff. As has been shown, there was to be no performance of the contract at issue in North Carolina. Additionally, there is not a North Carolina plaintiff here.

United Advertising, in finding insufficient contacts, keyed in on the principle enunciated in Hanson v. Denckla, supra, that the unilateral activity of one claiming a relationship with a non-resident defendant is insufficient to create the requisite contact. This

principle is highly significant in this case in that appellant's only contacts with North Carolina were the result of unilateral activity on the part of the borrower's broker, who is not a party to this action. In fact, appellee itself herein only has had contact with North Carolina through the unilateral activity of the non-party borrower's broker. These factors militate strongly in favor of a finding of insufficient contacts on the basis of Hanson v. Denckla, ibid.

The case of Staley v. Homeland, Inc., 368 F.Supp. 1344 (E.D.N.C. 1974) is important in this line of decisions because it capsules the crucial case law up to that point under N.C.G.S., §55-145, summarizing what that case law indicates in terms that reinforce the above discussion:

> Certain criteria appear from the above discussion which apply to the case at bar. First, if the company's activity is regular, or systematic, or continuous, minimum contacts exist. Second, if a contract is to be actually performed in North Carolina and has a substantial connection with this State, jurisdiction will lie. Third, where defendant obviously uses, benefits, or can easily use the laws of North Carolina, jurisdiction will lie. Fourth, if there is only one contact with North Carolina and such contact does not involve a contract to be performed here,

> there is no jurisdiction. And finally, if defendant has never had any interest in North Carolina or contacts here, even if it can reasonably be expected that his product will be used or consumed here, to grant jurisdiction for that reason would be unconstitutional. Id. at p. 1350.

In Staley, the court determined that insufficient contacts were present to allow jurisdiction over the corporate defendant under the above criteria.

In evaluating appellant's contacts with North Carolina in this case, it is evident that its activity in North Carolina does not rise to the levels required by Staley. Issuing a permanent loan commitment for two North Carolina projects is certainly not regular, systematic or continuous activity in North Carolina since the issuances emanated from Hollywood, Florida, and were solicited by the borrower's brokers. The performance of the commitment which appellant is alleged to have breached here was to be the purchase of the construction loan documents from appellee in Hollywood, Florida. Appellant has not obviously used or benefitted from the laws of North Carolina.[6]

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6 Though a North Carolina deed of trust utilized in such commitments might be suggested as invoking the benefits of North Carolina law, as will be discussed below, the deed of trust is merely incidental to the commitment as a whole.

Although in two transactions appellant has had incidental contacts with North Carolina, performance in this case did not involve substantial contacts with North Carolina, and, furthermore, performance is alleged by appellee in its complaint supposedly to have occurred in Hollywood, Florida. There is no product involved herein that would be used or consumed in North Carolina.

After finding that N.C.G.S., §1-75.4(4), provided a statutory basis for jurisdiction over the defendant in Munchak Corp. v. Riko Enterprises, Inc., 368 F.Supp. 1366 (M.D.N.C. 1973), the court proceeded to see if jurisdiction was allowable under the minimum contacts criteria. A North Carolina corporation sued a Pennsylvania corporation for damages resulting from alleged wrongful interference with plaintiff's contractual relations with a third party. Defendant contested the assertion of jurisdiction over it. The court dismissed for lack of in personam jurisdiction over the defendant. Defendant in the Munchak case had the following contacts with North Carolina: limited and sporadic marketing activity through television shows from which the defendant's share of revenue was pre-determined and did not vary whether or not the television show was aired in North Carolina; regular entry by defendant's agents into North Carolina for evaluating the talent of basketball players, although the agents were not authorized to enter into employment negotiations; and the defendant's interference with plaintiff's contract with one of its players in North Carolina. These contacts were held insufficient under the Fourteenth

Amendment to sustain jurisdiction. Again, these contacts would appear to involve greater contact with and activity in North Carolina than that of appellant. Appellant has sent no agents on a regular basis to North Carolina with an eye to future business dealings or negotiations nor has it committed any tortious act in North Carolina.

A North Carolina business association filed a civil action against a Delaware corporation due to the defendant's alleged failure to pay for goods shipped to it by the plaintiff. The case resulted in the decision by the North Carolina Court of Appeals which dismissed the suit due to lack of jurisdiction over the defendant. William R. Andrews Assocs. v. Sodi Bar Syss. of D.C., Inc., 28 N.C. App. 663, 222 S.E.2d 922 (1976), cert. den'd, 289 N.C. 726, 224 S.E.2d 676 (1976). In reversing the denial of the defendant's motion to dismiss, the North Carolina Court of Appeals found that the defendant did not have the minimum contacts necessary to allow North Carolina to acquire jurisdiction. In reading the court's treatment of the defendant's contacts with North Carolina, it is almost as if the court were reciting the contacts which this appellant has had with North Carolina: it maintained no office in North Carolina, solicited no business in North Carolina, advertised in no media coming into this state, and had no contact of any nature with any person, firm or corporation in the State of North Carolina excepting only its transactions with the plaintiff therein. Its only contact with North Carolina was that on two occasions it

had entered into contracts outside of North Carolina resulting in shipments of goods being made into North Carolina. The court found these contacts to be too meager to uphold jurisdiction.

In the Andrews case the plaintiff was a North Carolina business association whereas in this case the appellee is a New York corporation. Additionally, in the Andrews case the only contact with a business in North Carolina was with the plaintiff whereas in the instant case appellant's only contact with a business in North Carolina has been with and through Atlantic Mortgage as a result of Atlantic Mortgage's solicitation of appellant. Of course, Atlantic Mortgage is not a party to the instant lawsuit.

Various North Carolina cases have found sufficient contacts to sustain jurisdiction under N.C.G.S., §55-145(a)(1) when such jurisdiction was initially invoked due to performance of a contract in North Carolina. In these cases[7]

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7 In Byham v. Nat'l Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1955), the contract at issue was a franchise for restaurant operations in North Carolina and practically all of defendant's contacts with North Carolina grew out of performance by defendant under the franchises for North Carolina restaurants.

In Koppers Co., Inc. v. Chemical Corp., 9 N.C.App. 118, 175 S.E.2d 761 (1970), the court found minimum

can be seen the importance placed by the courts on performance in North Carolina of the contracts sued upon and contacts related to such performance as determinative of the minimum contacts inquiry. These cases evidence the substantial type of activity which has persuaded North Carolina courts to find sufficient contacts by a foreign defendant with North Carolina, a substantial type of activity not present in this case. For example, in Munchak Corp. v. Caldwell, 25 N.C. App. 652, 214 S.E.2d 194 (1975), the court, after determining that N.C.G.S., §55-145(a)(1), purported to grant jurisdiction, stated that:

> While the mere execution of a contract in North Carolina has never been held to be such a [substantial] connection, we believe that the execution, anticipated performance, and continuing part performance

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7 (Cont'd.)
contacts based on actions defendant had or might have to undertake in North Carolina as a result of performance or nonperformance of the contract at issue.

Similarly, the contacts of defendant in Crabtree v. Coats & Burchard Co., 7 N.C.App. 624, 173 S.E.2d 473 (1970), consisted mainly of a continuous pattern of sales activity in North Carolina, commissions on which were at issue therein.

> of the contract in Greensboro constitute substantial in-state activity. (Emphasis added.) Id. at p. 654.

In this language is found a typical approach of the courts which have considered jurisdiction under N.C.G.S., §55-145(a)(1), an approach which continually emphasizes that the minimum contacts required to support jurisdiction under due process must be intimately related to the contract itself and particularly to its performance. For example, in Munchak, one of the defendants who was a party to the contract at issue resided in North Carolina and received remuneration under the contract in North Carolina. The North Carolina courts have shown great willingness to find minimum contacts when the execution and performance of a contract at issue is in North Carolina and one of the parties was a North Carolina resident.

In Telerent Leasing Corp. v. Equity Assocs., Inc., 36 N.C. App. 713, 245 S.E.2d 229 (1978), the court placed emphasis on contacts of the defendant with North Carolina which related to performance of contracts of the defendant in order to justify its finding of minimum contacts. In Telerent these contacts were found principally in the ongoing contractual relations and obligations arising therefrom between defendants and plaintiff, a corporation with a principal place of business in North Carolina. In contrast, this case involves no ongoing contractual relations and obligations between appellant and

appellee, nor does either party have a principal place of business in North Carolina. It is also significant that performance of the contract involved in Telerent would be partly accomplished in North Carolina, a factor not present as to the contract at issue in this appeal.

It is in light of all of the above-described factors that it becomes clear that the North Carolina Court of Appeals' reliance on Equity Assocs. v. Soc. for Savings, 31 N.C. App. 182, 228 S.E.2d 76 (1976), is ill-placed. Although the case appears at first blush to be on all fours with the instant case, the differences in the two cases are significant. First, the plaintiff there was a North Carolina partnership that was actually a party to the contract, a strong factor in the courts' finding that jurisdiction exists.[8] Secondly, the contract sued upon there was a tri-partite loan agreement between the borrower, the construction lender and the permanent lender. Thirdly, though the contract in Equity was made in North Carolina, the court also seems to rest its finding of sufficient contacts upon an erroneous view that performance of the loan agreement by the permanent lender involved building a motel in

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8 Colston, Corporations - Jurisdiction over Foreign Corporations Not Qualified to Transact Business in North Carolina, 44 N.C. L.Rev. 457 (1966).

North Carolina and established the performance contacts that have been so strongly emphasized in other similar cases. As has been discussed, performance by the permanent lender as alleged by appellee here was to consist of appellant's "take-out" of appellee's construction loan by the purchase of the construction loan documents at appellant's office in Hollywood, Florida. Construction of the project for which the loan was made was not the performance desired or alleged by the plaintiff in either Equity or this case.

Appellant's contacts with North Carolina relate largely to a deed of trust to be issued in connection with the permanent loan commitment. That deed of trust is only incidental to the contract at issue and is a document having no relevance to the relationship, if any, between appellant and appellee. In agreeing to permanent financing, appellant was naturally interested in assurances that the security it would take for repayment of that loan would be adequate. Negotiations conducted in North Carolina, visits to the construction site, certain letters and phone calls to and from North Carolina would have involved efforts by appellant to analyze whether the credit and security to be provided would suffice to a degree that appellant felt safe in lending the substantial amount requested. Though this might at first blush appear to offer evidence of contacts with North Carolina, in truth the deed of trust and contacts relative thereto are merely incidental to the contract at issue and the obligations thereunder.

The heart of the contract and its performance consisted of extending permanent financing by purchase of a construction note and deed of trust, performance of which was contemplated in Hollywood, Florida.

It has been noted that the fact that a loan is secured by a deed of trust on property in a certain state does not affect the locality of the business being done.[9] A mortgage or deed of trust is deemed incidental to a loan, and a foreign corporation is not subject to the laws of the state where the subject real property is located. 9 John Marshall Jour. of Practice and Procedure 295, 322 (1976). The Restatement (Second), Conflict of Laws, §189, comment b (1971), provides as follows:

> By way of contrast, the rule [that the law of the situs of the property controls] does not apply to contracts in which one party agrees to lend the other money and the other promises to repay the loan and also to give a mortgage on his land as security. Here the debt is the principal thing in the minds of the parties, and the promise to give the mortgage is accessory to the debt.

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9 Note that the business being done herein is the lending of money in Hollywood, Florida.

Further, the existence of the deed of trust covering real estate in North Carolina would not have any substantial connection with performance of the permanent loan commitment. Additionally, any deed of trust executed to secure the permanent loan would create an obligation and contractual relationship between appellant and the borrower. Appellee was not a party to the transaction.

It would violate appellant's due process rights to allow assertion of jurisdiction over it. Appellant's contacts fail to provide the necessary connection with North Carolina when those contacts consist only of letters to North Carolina, telephone calls to North Carolina, visits to North Carolina by appellant's representatives and a previous permanent loan commitment issued from Florida on a project in North Carolina. Previous minimum contacts cases support a finding of insufficient contacts here, and fairness mandates such a finding. Appellant respectfully submits that allowing jurisdiction would represent a major departure from established jurisdictional standards under due process and a substantial erosion of due process protections that are available to foreign defendants.

II

ARTICLE 10 OF CHAPTER 55 OF THE NORTH CAROLINA GENERAL STATUTES IS AMBIGUOUS, CONTRADICTORY AND, THEREFORE, UNFAIR IN ITS APPLICATION TO FOREIGN CORPORATE LENDERS.

North Carolina statutory and case law as to jurisdiction has resulted in an extremely unfair trap for foreign corporations such as appellant. If in fact appellant can be subjected to jurisdiction in North Carolina under N.C.G.S., §55-145(a)(1), then this creates a policy that is contradictory to that contained in N.C.G.S., §55-131. No where is this more clearly exhibited than in this case. N.C.G.S., §55-131 recites several activities which if carried on in North Carolina are not to be deemed as constituting transacting business in North Carolina. One of these activities is:

> (6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State. . . .

By its own terms, N.C.G.S., §55-131, is effective for purposes of the statutory Chapter in which it is contained, which is the same Chapter in which N.C.G.S., §55-145(a)(1), is found. Appellant's only activities that have had any connection whatsoever with North Carolina have been of the type defined above as activities not constituting transacting business in North Carolina. Yet the statutes lay a tricky trap if the judgment of the North Carolina Court of Appeals is allowed to stand. By allowing jurisdiction under N.C.G.S., §55-145(a)(1), that court has allowed appellant to be lured into the State under the protection of N.C.G.S.,

§55-131(6). Once here, though only minimally here as far as contacts are concerned, the court has clamped its jurisdictional hold on appellant under a statute to which N.C.G.S., §55-131, is applicable, by virtue of acts it has performed that have been defined by N.C.G.S., §55-131, as not transacting business. The situation created by this apparent contradiction in the North Carolina statutes is reminiscent of a point made by the Court in Erlanger Mills v. Cohoes Fibre Mills, 239 F.2d 502 (4th Cir. 1956). There the court cited the burdens that could be placed on interstate commerce by the fact that even though a business's activity is insubstantial in a foreign forum, liberal jurisdictional provisions might nevertheless subject it to lawsuit there. Similarly, of what benefit is it to appellant to have its only activities in North Carolina deemed so insubstantial that it is defined by statute not to be transacting business in North Carolina if at the same time the statutes of the state and application thereof by the state courts result in its being subject to lawsuit therein. The contradiction - and the unfair trap it lays for ones such as appellant - are obvious.

Further, the contradiction between N.C.G.S., §§55-131 and 55-145(a)(1), creates a situation which would demand a finding of no jurisdiction over appellant in light of the fairness standard established by Shaffer v. Heitner, supra. The Shaffer case requires that assertions of jurisdiction over foreign defendants must be tested, in addition to other criteria, in light of whether

it is fair under the circumstances of the case to assert jurisdiction over the defendant. The contradiction between N.C.G.S., §§55-131 and 55-145(a)(1), certainly flies in the face of fairness especially as said statutes operate here. Appellant, upon solicitation by an independent party from North Carolina, was to make a loan, an activity deemed not transacting business in North Carolina. However, on the basis of this activity the North Carolina courts have grounded jurisdiction. The existence of this unfair trap for foreign corporations and resolution of the problems created thereby should be addressed by this Court.

III

N.C.G.S., §55-145(a)(1) DOES NOT PROVIDE A STATUTORY BASIS FOR JURISDICTION OVER APPELLANT WHEN APPLIED TO THE FACTS IN THIS CASE.

The North Carolina Court of Appeals in its opinion held N.C.G.S., §55-145(a)(1), to be the applicable statutory basis for sustaining jurisdiction over appellant and the cause of action herein arising out of a contract made in North Carolina. Appellant respectfully submits that said statute is inapplicable to the facts in this case, that the alleged contract was neither executed nor to be performed in North Carolina, and that, therefore, the opinion of the North Carolina Court of Appeals is clearly erroneous.

A. N.C.G.S., §55-131(6) excludes a permanent loan commitment from the purview of subsequent sections of Article 10 of Chapter 55 of the North Carolina General Statutes, including N.C.G.S., §55-145(a)(1).

N.C.G.S., §55-131(6), provides that the "making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State . . . ." is not the type of contractual transaction which subjects a foreign corporation to the provisions of Chapter 55, including N.C.G.S., §55-145(a)(1), on which the North Carolina Court of Appeals has based jurisdiction over appellant. It is not consistent nor, the appellant would urge, proper for the North Carolina courts to find jurisdiction on the basis of a type of contract which the North Carolina legislature has excepted from the applicability of the chapter of the statutes upon which jurisdiction has been based.

B. The permanent commitment, as appellee contends it is constituted, by its own terms, establishes that the final act necessary to consummate the commitment at issue is not a contract made in North Carolina.

Appellee herein has contended that the contract being sued upon is contained in a letter issued by appellant on April 14, 1972. The North Carolina

Court of Appeals found that the contract at issue herein was made in North Carolina thus invoking jurisdiction under N.C.G.S., §55-145(a)(1).[10] This finding is clearly erroneous and inconsistent with the terms of the commitment itself. In a letter of April 14, 1972, written by the president of appellant, are set forth the terms of appellant's proposed permanent loan commitment. The last two sentences of that commitment identify the final acts necessary to accept or consummate the commitment:

> For your convenience, I am enclosing a copy of this letter for your acceptance. Receipt of same, executed by the borrower, together with the commitment fee of $60,000.00 must be acknowledged by May 15, 1972 or this commitment letter will be automatically cancelled. (Emphasis added.)

North Carolina case law indicates that the place of the consummation of a contract is that place where the last act required for a meeting of the minds was performed by either of the parties to the agreement. Nytco Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 23 S.E.2d 559 (1976); Equity Assocs.

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10 §55-145(a)(1) purports to grant jurisdiction over a foreign corporation not transacting business in North Carolina when the cause of action arises out of a contract made in North Carolina.

v. Soc. for Savings, supra; Willis Bros., Inc. v. Ocean Scallops, Inc., 356 F.Supp. 151 (E.D.N.C. 1972). Under the terms of appellant's offer to make a permanent loan commitment, that last act is clearly defined as the receipt by appellant in Florida of a copy of the commitment letter executed by borrower and accompanied by a $60,000.00 commitment fee. Thus the contract at issue was made in Florida and not in North Carolina as the North Carolina Court of Appeals has erroneously found.

C. The contract as accepted by the prospective borrower consisted of three letters (an offer by appellant from Florida to make a permanent loan, a counter-offer in the form of a conditional acceptance made by the borrower from North Carolina and an acceptance by appellant in Florida of the counter-offer) and was made in Florida.

Appellant has consistently maintained that the permanent loan commitment at issue herein was comprised of three letters, the last of which was the final act necessary to indicate a meeting of the minds and thus consummate the contract. Nytco Leasing, Inc. v. Dan-Cleve Corp., supra; Willis Bros., Inc. v. Ocean Scallops, Inc., supra. Appellant issued a letter dated April 14, 1972, setting forth terms of a proposed permanent loan commitment and mailed said letter to the borrower's mortgage broker in Winston-Salem, North Carolina. Borrower executed a copy of the April 14th commitment letter

and returned it to its broker with a cover letter requesting certain changes to the permanent commitment. This conditional acceptance, or counter-offer, was forwarded to appellant. Appellant consummated the permanent loan commitment by accepting the conditions of the counter-offer by means of a letter of May 24, 1972, issued by a representative of appellant from its offices in Hollywood, Florida. The North Carolina Court of Appeals found that the permanent loan commitment was a contract made in North Carolina. Appellant submits that a close review of the relevant letters, attached hereto as Appendices E-1, E-2 and E-3, will show that the last act required for a mutual meeting of the minds was appellant's May 24, 1972, letter from Florida accepting the borrower's counter-offer.

D. The inapplicability of N.C.G.S., §§55-145(a)(1), is further evidenced by the lack of contacts between appellee and appellant, the permanent loan commitment, and the construction loan commitment.

The contract on which appellee alleges a cause of action was a permanent loan commitment made by appellant to a broker representing a prospective borrower. This commitment was made almost nine months prior to appellee's issuance of a construction loan commitment to the proposed borrower's successor. Appellee's complaint herein purports to set up appellee as a third-party beneficiary of the permanent loan commitment. The third party rights, if

any, arose from actions taken by appellee in and from its principal place of doing business in New York, i.e. the making of a construction loan. No where in the evidence before the court at the hearing on appellant's motion to dismiss is there any indication of contacts between appellee and appellant in connection with the issuance by appellant of its permanent loan commitment and either the issuance by appellee of its construction loan commitment or the making of the construction loan by appellee. All contacts for the issuance of the permanent loan commitment were made by the prospective borrower's broker with appellant primarily by telephone and in Florida. All negotiations between the proposed borrower and appellee were handled by the borrower's broker with the appellee in New York.

E. The only other possible contractual basis for appellee's cause of action is not a contract made or to be performed in North Carolina.

The only other contractual basis alleged by appellee is an undated estoppel certificate agreement. This agreement was in the form of a letter addressed from appellant to appellee wherein the appellant acknowledged that the proposed borrower was not at that time in default under the terms and conditions of the permanent loan commitment and had satisfied certain terms and conditions of its permanent loan commitment and, also, agreed to certain mechanics of the closing of the permanent loan at such time as all of the conditions of the permanent loan commitment

had been complied with. This estoppel certificate was initially drafted by the borrower's broker but was redrafted and executed by representatives of the appellant at its Hollywood, Florida offices. The certificate was then taken by the borrower's broker to the New York offices of appellee. If this estoppel certificate provides a contractual basis for appellee's complaint, then it is not sufficient to invoke jurisdiction under N.C.G.S., §55-145(a)(1), since it was not a contract made in North Carolina. Nytco Leasing, Inc. v. Dan-Cleve Corp., supra; Willis Bros., Inc. v. Ocean Scallops, Inc., supra. And based on the allegations in appellee's complaint performance was not contemplated in North Carolina as the delivery of the documents to effect the "take-out" was alleged to have been made in Hollywood, Florida.

F. The contract at issue herein does not qualify as a contract to be performed in North Carolina under N.C.G.S., §55-145(a)(1).

Performance of the contract at issue herein was contemplated to be at the offices of appellant in Hollywood, Florida. Performance of the contract at issue was to consist of a purchase or "take-out" by appellant of the construction loan of appellee. If the tender by appellee of the documents for such purchase or take out were valid and complete as alleged by appellee, the performance by appellant called for by appellee did not require contact with North Carolina as evidenced by appellee's

purported tender at appellant's offices in Hollywood, Florida.

G. There is no other basis giving rise to jurisdiction over appellant under any North Carolina long-arm statute.

The only other available statutory grounds for jurisdiction over appellant are found at N.C.G.S., §§55-144 and 1-75.4. Copies of these statutes are attached hereto as Appendices D-1 and D-2 respectively. None of the provisions of these statutes appear applicable to the facts in this case. N.C.G.S., §55-144 refers to suits against foreign corporations transacting business in the State without authorization. N.C.G.S., §55-131, as has been seen, specifically provides that the making of a loan or permanent loan commitment by appellant did not constitute transacting business in North Carolina. N.C.G.S., §§1-75.4(1) - (6), contains other grounds for the assertion of jurisdiction over a foreign defendant. Appellant respectfully submits that an analysis of the provisions of the latter statute will indicate that its provisions are inapplicable to the facts here. Although appellee referred to both statutes in its brief and argument to the North Carolina Court of Appeals, that court did not discuss or refer to either statute in its opinion.

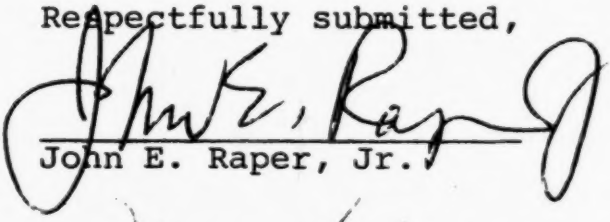
In summary, appellant submits that under the facts of this case N.C.G.S., §55-145(a)(1), does not constitute a statutory basis for the assertion of jurisdiction over appellant in North

Carolina, because there was no contract between appellant and appellee made or to be performed in North Carolina. In basing its findings on this statute, the North Carolina Court of Appeals acted in a clearly erroneous manner. The appellant requests that this error be reversed.

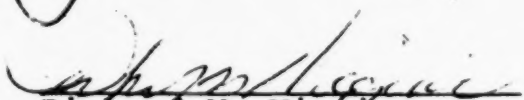
CONCLUSION

For the reasons stated above, probable jurisdiction should be noted.

Respectfully submitted,



John E. Raper, Jr.



Richard M. Wiggins

McCoy, Weaver, Wiggins,
Cleveland & Raper

Attorneys for Appellants

Dated: October 2, 1979

CERTIFICATE

In accordance with Rules 13(2) and 33(1) of the Rules of the Supreme Court of the United States, I hereby certify that I have on this 2nd day of October, 1979, filed the required 40 copies of Appellant's Jurisdictional Statement in the office of the Clerk of the U. S. Supreme Court and have mailed the required three copies of the same to Sydnor Thompson and Fred T. Lowrance, Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, 1100 Cameron-Brown Building, Charlotte, North Carolina 28204 by depositing same in a United States mail box with first class postage prepaid.

Given under my hand this 2nd day of October, 1979.

John E. Raper, Jr.

No. 170PC TWENTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
Spring Term 1979

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CHEMICAL REALTY CORPORATION	)	
	)	JUDGMENT DISMISSING
v.	)	APPEAL ON MOTION OF
	)	AND DENYING PETITION
HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD	)	FOR DISCRETIONARY REVIEW
	)	(7828SC420)

****

This matter came on to be considered upon defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G. S. 7A-30, upon the plaintiff's motion to dismiss the appeal for lack of a substantial constitutional question, and upon defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G. S. 7A-31; upon consideration thereof, it is adjudged by the Court in conference this 28th day of June, 1979, that the motion to dismiss the appeal be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the Defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Brock, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 5th day of July, 1979.

s/ John R. Morgan
John R. Morgan
Clerk of the Supreme
Court of North
Carolina

cc: North Carolina Court of Appeals
McCoy, Weaver, Wiggins, Cleveland & Raper,
Attorneys at Law
Grier, Parker, Poe, Thompson, Bernstein,
Gage & Preston, Attorneys at Law

40 N.C. App. 675
O P I N I O N
CHEMICAL REALTY CORPORATION v. HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF HOLLYWOOD

No. 7828SC420

(Filed 17 April 1979)

APPEAL by defendant from Martin (H. C.), Judge. Orders entered 1 October 1977 and 27 October 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 26 February 1979.

Plaintiff Chemical Realty Corporation (Chemical) is a New York corporation with its principal office in New York City. Defendant Home Federal Savings & Loan Association of Hollywood (Home Federal) maintains its principal office in Hollywood, Florida. Chemical alleges that Home Federal made a permanent loan commitment to advance $6,000,000 upon the completion of the Landmark Hotel in Asheville, North Carolina, and that in reliance on this permanent loan commitment Chemical made a $6,000,000 construction loan commitment to Landmark. Chemical further alleges that the parties entered into a "Letter Agreement" by which Home Federal agreed that upon construction of the hotel in substantial compliance with the plans and specifications it would purchase from Chemical a note for the indebtedness of Landmark to Chemical for the funds advanced under the construction loan and would accept an assignment from Chemical of a deed of trust on the hotel. For the alleged refusal of Home

Federal to perform under this letter agreement, Chemical seeks damages of at least $6,000,000. Chemical seeks a second $3,000,000 for the alleged refusal of Home Federal to extend the time during which the permanent loan commitment and letter agreement would be in effect, pursuant to the terms of the agreements.

Home Federal moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and improper service of process. In the alternative, Home Federal sought a "change of venue" to Broward County, Florida on the ground that Buncombe County is an inconvenient forum. Chemical then moved for leave to amend its complaint and summons by changing the defendant's name from "Home Federal Savings & Loan Association" to "Home Federal Savings and Loan Association of Hollywood."

The trial court granted Chemical leave to amend and denied Home Federal's motions to dismiss and for change of venue, making findings of fact and conclusions of law in support of its order. Home Federal's motion to amend the findings and conclusions was denied. Home Federal appeals.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by Sydnor Thompson and Fred T. Lowrance, and Van Winkle, Buck, Wall, Starnes, Hyde and Davis, by Herbert L. Hyde, for plaintiff appellee.

John E. Raper, Jr. and Reginald M. Barton, Jr., for defendant appellant

ARNOLD, Judge.

I.

[1] Home Federal's argument that this action should have been dismissed for lack of subject matter jurisdiction is without merit. Original civil jurisdiction "is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice." G.S. 7A-240. And where the amount in controversy exceeds $5,000, the superior court is the proper division for the trial. G.S. 7A-243. This action was brought appropriately in superior court.

II.

[2] Home Federal argues that none of the circumstances which would give the North Carolina courts personal jurisdiction over it exists in this case. In determining this question we consider North Carolina's long-arm statutes, since it is stipulated that Home Federal is a federal savings and loan association with its principal office in Hollywood, Florida, and that it has not applied for authority to transact business in North Carolina or appointed a local agent for service of process.

G.S. 55-145(a) provides that "[e]very foreign corporation shall be subject to suit in this State. . . on any cause of action arising. . . (1) Out of any contract made in this State or to be performed in this State . . . ." Home Federal contends that the permanent loan commitment was made not in North Carolina, but in Florida; that the "Letter Agreement" referred to in Chemical's complaint was in fact not an agreement, but an "estoppel certificate"; and that performance of any commitment was to take place in Florida.

For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here. Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15, aff'd 277 N.C. 223, 176 S.E.2d 784 (1970). In Goldman, a letter was sent to the North Carolina plaintiff from Atlanta, Georgia, instructing him: "If the above is agreeable, please sign and return the original copy of this letter." Plaintiff signed the letter in Greensboro, North Carolina, and deposited it in the mail there addressed to a Texas corporation. This Court found that the final act necessary in that case to create a binding obligation was the depositing of the letter containing the plaintiff's signature in the mail.

In the present case, three communications between the parties make up the permanent loan commitment. On 14 April 1972, Home Federal sent the permanent loan commitment letter to a North Carolina mortgage broker for forwarding to the borrower. This letter stated: "I am enclosing a copy of this letter for your acceptance. Receipt of same, executed by the borrower, together with the commitment fee of $60,000.00 must be acknowledged by May 15, 1972, or this commitment letter will be automatically cancelled." On 15 May 1972 the borrower executed a copy of the commitment letter and delivered it with a cover letter and the commitment fee to the mortgage broker, who mailed the letters and fee to Home Federal. The borrower's cover letter stated: "Attached please find copy of Commitment accepted by me on behalf of Asheville Development Associates as well as check for $60,000. We respectfully request that the following items and points of clarification be added to and made a part of captioned

Commitment. . . ." On 24 May 1972 Home Federal wrote back to the mortgage broker: "Please be advised that this Association is in receipt of $60,000.00 tendered by Asheville Development Associates. This letter is to confirm that our mortgage commitment dated April 14, 1972, is in full force and effect subject to three items. . . ."

Home Federal would have us find that the borrower's cover letter of 15 May was not an acceptance, but a counter-offer, and that Home Federal's letter of 24 May was the acceptance of this counter-offer and the final act necessary to create a binding contract. We see no support for this position in the communications involved. The borrower's letter of 15 May by its terms accepts the permanent loan commitment and requests three added "points of clarification" which do not change the essential nature of the commitment. The acceptance is not made conditional upon addition of the requested points. See 17 C.J.S. Contracts §43. Nor does Home Federal by its letter of 24 May treat the borrower's letter as a counter-offer; it merely acknowledges receipt of the commitment fee and confirms the mortgage commitment. We find that the contract was completed by the borrower's acceptance in North Carolina of the permanent loan commitment. As a result, G.S. 55-145(a)(1) applies to give the North Carolina courts personal jurisdiction over Home Federal.

Home Federal next contends that even if the statutory standards for jurisdiction are met, the constitutional requirements of due process are not. This contention is untenable. In Equity Associates v. Society for Savings, 31 N.C. App. 182, 228 S.E.2d 761, cert. den. 291 N.C. 711 (1976), we found,

based upon a fact situation practically identical to the one before us, that the contract itself was sufficient to satisfy the "minimum contacts" requirement of International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed 95 (1945). Also, here, as in Equity Associates, other factors set out in Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965), for satisfying the test of "minimum contacts" and "fair play" are present. It is stipulated that Home Federal received actual notice of the action. Since the hotel which was the subject of the loan was constructed here, it seems clear that "crucial witnesses and material evidence," id., at 57, 143 S.E.2d at 231, also will be found here. Home Federal has availed itself of the benefits and protections of our laws not only by the instant contract, but also by a permanent loan commitment for a $2,500,000 loan for an apartment project in Jacksonville, North Carolina. That loan is secured by a deed of trust filed in North Carolina, and is being serviced by the North Carolina mortgage broker who arranged the loan in this action. Due process is satisfied.

III.

[3] Chemical's complaint and summons named as defendant "Home Federal Savings and Loan Association." Home Federal assigns as error the granting of Chemical's motion to amend these documents so that the defendant's name appears as "Home Federal Savings and Loan Association of Hollywood." As Chemical points out, it was entitled to amend its complaint as a matter of right, since no responsive pleading had been filed. G.S. 1A-1, Rule 15(a). Amendment of the summons may be allowed by the court in its discretion "unless it clearly appears that material

prejudice would result to substantial rights of the party against whom the process issued." G.S. 1A-1, Rule 4(i). Home Federal has not shown any prejudice that resulted from this misnomer. It is stipulated that Home Federal received the complaint and summons and knew that they were meant for it. We find no error in the court's ruling. Accord Bailey v. McPherson, 233 N.C. 231, 63 S.E.2d 559 (1951); Propst v. Hughes Trucking Co., 223 N.C. 490, 27 S.E.2d 152 (1943).

IV.

Home Federal contends that its motion to amend certain findings of fact and conclusions of law in the trial court's order should have been granted because the findings are not supported by the evidence. Where the trial judge finds the facts, they are conclusive on appeal if there is evidence to support them, even if there is also evidence to the contrary. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976); Cox v. Cox, 33 N.C. App. 73, 234 S.E.2d 189 (1977). We have examined the contested findings and have found that each is based upon competent evidence.

Home Federal finally argues that certain findings and conclusions should be stricken because they are irrelevant to the issues before the court at the hearing on the motion. We find that all the challenged determinations resulted from issues raised by Home Federal in its motion. This assignment of error is unfounded.

We have considered Home Federal's other assignments of error and find that they are without legal merit.

Affirmed.

Chief Judge MORRIS and Judge CLARK concur.

No. 7828SC420 TWENTY-EIGHTH DISTRICT
(North Carolina Supreme Court
No. 170 PC)

NORTH CAROLINA COURT OF APPEALS

* *

CHEMICAL REALTY CORPORATION	)	
	)	From Buncombe
v.	)	(No. 76 CVS 02491)
HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD	)	Filed September 19, 1979, Clerk, N. C. Court of Appeals

* *

NOTICE OF APPEAL

Appellant, Home Federal Savings and Loan Association of Hollywood, appeals to the Supreme Court of the United States from the final judgment of this Court filed on April 17, 1979 and certified on May 7, 1979, and from which judgment appellant appealed to and alternatively petitioned for discretionary review by the North Carolina Supreme Court, which Court dismissed appellant's appeal and denied its petition for discretionary review in conference on June 28, 1979, with judgment so ruling being issued and certified on July 5, 1979. The judgment appealed from upheld the trial court's denial of appellant's motion to dismiss for lack of jurisdiction over appellant.

This appeal is taken pursuant to 28 U.S.C.A., §1257. Jurisdiction has been asserted over appellant under the North Carolina long-arm statute found at N.C.G.S., §55-145(a)(1). Appellant at all times has claimed that assertion of jurisdiction over

it under §55-145(a)(1) and under any other North Carolina jurisdictional statutes violates rights secured to it under the Fourteenth Amendment to the Constitution of the United States. The final judgment from which this appeal is taken is in favor of the validity of said statute.

s/ John E. Raper, Jr.

s/ Richard M. Wiggins

Attorneys for Appellant
Post Office Box 2129
Fayetteville, NC 28302
(919) 483-8104

OF COUNSEL:

McCoy, Weaver, Wiggins,
Cleveland & Raper
Post Office Box 2129
Fayetteville, NC 28302

AFFIDAVIT OF SERVICE

John E. Raper, Jr., first being duly sworn, deposes and says:

1. That he is an attorney of record in the herein case for appellant, Home Federal Savings and Loan Association of Hollywood.

2. That he has, in accordance with the requirements of Rules 33(1) and 33(3)(c) of the Rules of the Supreme Court of the United States, on the date below named, served the foregoing Notice of Appeal on Sydnor Thompson and Fred Lowrance, Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, 1100 Cameron-Brown Building, Charlotte, North Carolina 28204, by depositing a copy of said Notice of Appeal in the United States mail

box, with first class postage prepaid, addressed to the above-named counsel of record for the appellee, Chemical Realty Corporation, at the address above recited.

And further your affiant saith not.

This the 18th day of September, 1979.

s/ John E. Raper, Jr.

Sworn to and subscribed
before me this 18th day
of September, 1979.

s/ Leslie A. Heilman
Notary Public

My Commission Expires:
12-27-82

N.C.G.S., §55-144

§55-144. Suits against foreign corporations transacting business in the State without authorization.--Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served. (1901, c. 5; Rev., s. 1243; C. S., s. 1137; G.S., s. 55-38; 1955, c. 1143; c. 1371, s. 1.)

N.C.G.S., §1-75.4

§1-75.4. Personal jurisdiction, grounds for generally.--A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

(1) Local Presence or Status.--In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
   a. Is a natural person present within this State; or
   b. Is a natural person domiciled within this State; or
   c. Is a domestic corporation; or
   d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

(2) Special Jurisdiction Statutes.--In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

(3) Local Act or Omission.--In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

(4) Local Injury; Foreign Act.--In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the

injury either:

a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or

b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed within this State in the ordinary course of trade.

(5) Local Services, Goods or Contracts.-- In any action which:

a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or

d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or

e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

(6) Local Property.--In any action which arises out of:

a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; or

b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it.

(7) Deficiency Judgment on Local Foreclosure or Resale.--In any action to recover a deficiency judgment upon an obligation secured by a mortgage, deed of trust, conditional sale, or other security instrument executed by the defendant or his predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

a. In an action in this State to foreclose such security instrument upon real property, tangible personal property, or an intangible represented by an indispensable instrument, situated in this State; or

b. Following sale of real or tangible personal property or an intangible represented by an indispensable instrument in this State under a power of sale contained in any security instrument.

(8) Director or Officer of a Domestic Corporation.--In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

(9) Taxes or Assessments.--In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this State after the date of ratification of this act.

(10) Insurance or Insurers.--In any action which arises out of a contract of insurance as defined in G.S.58-3 made anywhere between the plaintiff or some third party and the defendant and in addition either:

a. The plaintiff was a resident of this State when the event occurred out of which the claim arose; or

b. The event out of which the claim arose occurred within this State, regardless of where the plaintiff resided.

(11) Personal Representative.--In any action against a personal representative to enforce a claim against the deceased person represented, whether or not the action was commenced during the

lifetime of the deceased, where one or more of the grounds stated in subdivisions (2) to (10) of this section would have furnished a basis for jurisdiction over the deceased had he been living. (1967, c. 954, s. 2.)

L E T T E R H E A D

HOME FEDERAL SAVINGS AND LOAN
1720 Harrison St.
P. O. Box 2168
Hollywood, Florida 33022

April 14, 1972

Mr. J. P. Lauffer
Atlantic Mortgage and Investment Company
3034 Trenwest Drive
Winston Salem, North Carolina 27103

Re: Proposed 300-Room Convention Hotel,
Asheville, North Carolina

Dear Mr. Lauffer:

This letter is to confirm my oral conversation with you regarding our commitment for $6,000,000.00 on the above proposed project, as more specifically described in the feasibility report directed to Mr. Earl Crawford of Overland Investments, Limited, 1907 Park Drive, Charlotte, North Carolina 28204, prepared by Laventhol, Krekstein, Horwath and Horwath, C.P.A.'s.

The terms of this commitment are as follows:

1. The receipt of an acceptable MAI appraisal by this Association prior to closing, indicating a value of the real estate to be encumbered of not less than $8,000,000.

2. This Association will disburse all loan proceeds available upon the full completion of the proposed hotel project in accordance with the working plans and specifications to be provided from that preliminary plan prepared by Lawrence J. Traber,

A.I.A., Job # 10-709, dated November 24, 1971. Such disbursement of proceeds will also be predicated upon the proposed facility being completely furnished and equipped to function in accordance with the assumptions made in the aforementioned feasibility report.

3. The interest rate will be 9 1/2% including 1/10 of 1% available for service to your Mortgage Company. Such loan shall be made for a period of 24 years and pursuant to all existing Federal Home Loan Bank regulations.

4. This loan is subject to an acceptable management contract to be executed by the borrower and the Hyatt House Hotel Corp.

5. This commitment will also be subject to such loan placing Home Federal Savings and Loan Association in the position of a mortgagee holding a valid first lien under the laws of the State of North Carolina, to which effect, title insurance must be provided in a Company acceptable to this Association.

6. All documentation required by the regulations of the Federal Home Loan Bank and the Federal Savings and Loan Insurance Corporation in effect at the time of funding of this loan, must be provided.

7. Any and all expenses incident to the purchase of said loan, must be paid by the borrower.

8. This commitment will be in full force and effect for a period of one (1) year from this date, subject; however, to the receipt of $60,000.00 not later than May 15, 1972, which fee is non-refundable.

In the event the borrower wishes to extend the commitment for an additional period of time the Association is willing to grant such extension, based on a commitment fee of $30,000.00 for each additional six-month period that such commitment remains in good standing. It is to be specifically understood that such fee must be paid fifteen (15) days prior to the expiration date of the outstanding commitment and that such fee also is to be the sole property of the Association for the payment of this commitment alone, whether or not such loan is ultimately consummated.

9. This commitment shall continue to be valid and effective under the conditions as stated above, but will automatically terminate by the happening of the following:

(a) The Association's failure to receive written certification from all applicable Government Authorities indicating that the completed project has been approved by them and that it can be operated and utilized in accordance with the assumption made in the aforementioned feasibility report.

(b) The adjudication of the borrower as bankrupt or insolvent by a Court of Competent Jurisdiction, or an order of such Court, and if such adjudication or order shall remain in force for a period of forty (40) days.

(c) All taxes and insurance shall be escrowed by the borrower, sufficient to provide for payment on the date that same are due and payable.

10. The personal liability of the principals and their spouses will apply to the top 1/3 of the principal balance of the

original loan. More specifically, Overland Investments, Limited, James T. Crawford and Vestal Taylor; and Earl Crawford.

For your convenience, I am enclosing a copy of this letter for your acceptance. Receipt of same, executed by the borrower, together with the commitment fee of $60,000.00 must be acknowledged by May 15, 1972 or this commitment letter will be automatically cancelled.

Sincerely yours,

s/ Thomas M. Wohl
President

TMW/gdr

L E T T E R H E A D

Uzzell and DuMont
311 Jackson Building
Asheville, N. C. 28807

15 May 1972

Mr. J. Michael Burroughs
Atlantic Mortgage & Investment Company
3034 Trenwest Drive
Winston-Salem, North Carolina 27103

Re: 14 April 1972 $6,000,000.00 Commitment
Home Federal Savings & Loan, Hollywood, Fla.
Proposed 300-Room Convention Hotel, Asheville, N.C.

Dear Mr. Burroughs:

Attached please find copy of Commitment accepted by me on behalf of Asheville Development Associates as well as check for $60,000.

We respectfully request that the following items and points of clarification be added to and made a part of captioned Commitment:

1. In the event M.A.I. appraisal is less than $8,000,000.00, Home Federal Savings & Loan may reduce its Loan Commitment proportionately to 75% of the appraisal.

2. Since Vestal Taylor is unmarried and my wife's health and her attending physicians prohibit her from engaging in any business activities, we would like to substitute a Nondivestature Agreement signed by all principals; and

3. In the event Home Federal does not approve either M.A.I. appraisal or Manage-

ment Contract or Plans, $60,000.00 Commitment Fee as well as all other fees paid will be returned.

Should there be any questions about the foregoing points of clarification, I will be glad to meet with you or Mr. Wohl, President of Home Federal, in order that such questions can be personally and immediately resolved.

I know that you will be pleased to learn that the firm of Whittington-Brice Associates, A.I.A., have been retained as architects for this project; this firm has a broad experience in high-rise structures and hotel facilities.

Please advise Mr. Wohl that we appreciate the personal trip he made to the site of this project and his interest in it, and I am certain that the project will be one which he and his institution will be proud of. Needless to say, we sincerely appreciate your fine, usual splendid cooperation and assistance. With best wishes, I am

Sincerely yours,

ASHEVILLE DEVELOPMENT ASSOCIATES

By: s/ F. Earl Crawford, Jr.
Managing Partner

/pb

Attachment

L E T T E R H E A D

HOME FEDERAL SAVINGS AND LOAN
1720 Harrison St.
P. O. Box 2168
Hollywood, Florida 33022

May 24, 1972

Mr. J. P. Lauffer
Atlantic Mortgage and Investment Company
3034 Trenwest Drive
Winston Salem, North Carolina 27103

Dear Mr. Lauffer:

Please be advised that this Association is in receipt of $60,000.00 tendered by Asheville Development Associates. This letter is to confirm that our mortgage commitment dated April 14, 1972, is in full force and effect subject to three items:

1. Home Federal Savings and Loan Association may reduce its loan commitment to 75% of the appraised value of the property in the event such required MAI appraisal is less than $8,000,000.00.

2. Home Federal Savings and Loan Association will not require the wife of F. Earl Crawford, Jr. to personally endorse the note, provided; however, Mr. Crawford executes a Nondivestature Agreement satisfactory to our counsel.

3. In the event Home Federal Savings and Loan Association does not approve the MAI appraisal, management contracts or plans, said commitment fee will be returned less all costs expended by this Association in connection with this commitment.

Sincerely yours,

s/ Thomas M. Wohl
President

TMW/pj